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AUTO DUNIA SDN BHD

v.

TIONG NGOH HOH

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HIGH COURT SABAH & SARAWAK, SIBU
HAMID SULTAN ABU BACKER JC
[JUDICIAL REVIEW NO: 25-2-2008(JR)]
4 FEBRUARY 2009

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ADMINISTRATIVE LAW: *Judicial remedies - Judicial review - Application for leave - Whether applicant must demonstrate subject matter of complaint amenable to judicial review - Whether applicant ought to show locus standi - Whether applicant ought to show prima facie case - Application ought not to be frivolous*

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CIVIL PROCEDURE: *Affidavits - Deposition by solicitor - Application for prerogative remedies - Whether applicant to personally affirm affidavit-in-support - Whether affidavit affirmed by solicitor irregular - Whether such irregularity curable*

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LABOUR LAW: *Industrial Court - Powers of - Whether Industrial Court conferred wide powers to make interlocutory orders - Whether such interlocutory orders amenable to judicial review*

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The applicant sought leave from the High Court to apply for *certiorari* to quash the decision of the Industrial Court allowing the respondent's application to amend his rejoinder to the statement of reply. The applicant was thus challenging a decision relating to an interlocutory application in the proceedings. The affidavit in support of the applicant's application was filed by the applicant's counsel.

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Held (dismissing the application):

(1) A judicial review proceeding involves a two stage process. It is first preceded by an application for leave to apply for judicial review. At this stage, the applicant must demonstrate that the subject matter of the complaint is amenable to judicial review, at the discretion of the court. The leave application is procedural in nature and is similar to a vetting process. The applicant must first show that he has *locus standi* and is not a mere 'busy-body' or 'mischief-maker'. Secondly, the applicant must demonstrate a *prima facie* case for leave to be granted. The application cannot be frivolous – there must be substance in the grounds to support the application. *Tang Kwor Ham &*

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Ors. v. Pengurusan Danaharta Nasional Bhd & Ors (foll); *Association of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association* (foll); *Clear Water Sanctuary Golf Management Bhd. v. Ketua Pengarah Perhubungan Perusahaan & Anor* (foll). (para 4)

(2) In the instant case, the applicant's complaint was in respect of the correctness of the decision made by the Industrial Court chairman relating to an interlocutory application that was procedural in nature. The Industrial Court is given wide powers under s. 29 of the Industrial Relations Act 1967 to make interlocutory orders that are necessary or expedient for the expeditious determination of the matter before it. Industrial jurisprudence does not allow courts to ordinarily interfere with interlocutory matters especially when they are procedural in nature. *Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd* (refd). (para 5)

(3) Solicitors ought not to affirm affidavits on behalf of their clients unless the affidavit is of a formal nature, such as an affidavit of service. When seeking prerogative remedies, it is mandatory for the applicant to affirm the affidavit and seek the remedy personally, save for certain instances where the applicant cannot be present. In the instant case, although the counsel had first filed the affidavit in support, the applicant had filed a subsequent affidavit to regularize the proceedings. The court would condone the irregularity and consider the application on the merits. (para 5)

Case(s) referred to:

Association of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association [1990] 2 CLJ 734 SC ***(foll)***

Chong Chung Moi v. State Government of Sabah & 2 Ors [2007] 4 AMR 472; [2007] 5 MLJ 441 ***(refd)***

Clear Water Sanctuary Golf Management Bhd v. Ketua Pengarah Perhubungan Perusahaan & Anor [2007] 10 CLJ 111 HC ***(foll)***

Jekri Mohd Zinin & 4 Ors v. Director of Lands & Surveys, Sabah & Anor [2007] 1 LNS 549 ***(refd)***

John Peter Berthelsen v. Director-General Of Immigration, Malaysia & Ors [1986] 2 CLJ 409; [1986] CLJ (Rep) 160 SC ***(refd)***

Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd [1997] 3 CLJ 777 SC ***(refd)***

Malayan Banking Bhd v. Charterefield Corporation Sdn Bhd [2001] 6 CLJ 407 HC ***(refd)***

Mohamed Nordin Johan v. Attorney-General, Malaysia [1983] 1 MLJ 68 ***(refd)***

A *QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor [2006] 2 CLJ 532 CA* ***(refd)***

R Rama Chandran v. The Industrial Court of Malaysia & Anor [1997] 1 CLJ 147 FC ***(refd)***

Ta Wu Realty Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor [2008] 6 CLJ 235 CA ***(refd)***

B *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors [2006] 1 CLJ 927 CA* ***(foll)***

Legislation referred to:

Industrial Relations Act 1967, s. 29

C *For the applicant - M/s David Allan Sagah & Teng Advocates*
For the respondent - Not represented

Reported by Andrew Christopher Simon

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JUDGMENT

Hamid Sultan Abu Backer JC:

[1] This is my judgment in respect of the applicant's *ex parte* E application seeking leave to apply for an order of *certiorari* to quash the decision and/or ruling of the Industrial Court handed down on 27 June 2008, allowing the respondent's application for proposed amendments to the re-joinder to the statement of reply.

F **[2]** The learned counsel for the applicant says the learned chairman's decision was unreasonable and/or unfair and/or unjust in the exercise of discretion. And particularise them as follows:

Particulars

G (a) the learned Chairman had committed an error of law in failing to consider the key issue of whether the application by the Respondent to amend his Rejoinder was made *bona fide*,

(b) The learned Chairman had, in arriving at His Honour's decision, failed to take into consideration the relevant issue and/or point H that the only basis proffered by the Respondent in his Affidavit in Support affirmed on 14.06.2007 for making the Proposed Amendments to his Rejoinder was that to be upon and after hearing the testimony of Mr. Tan Eng Hwa, the Executive Director of the Company ("COW1") during the trial of the matter held on 25.1.2007 to 26.1.2007, touching on the I specifications of the Nissan Diesel logging trucks. No further material and/or cogent reasons were advanced by the Respondent in his Affidavit; and

(c) The learned Chairman had, in arriving at His Honour's decision, failed to take into consideration the relevant issue and/or point that, the Respondent had in his Affidavit plainly shown that his Proposed Amendments introducing this new reason were and are made only in clear afterthought, occurring only after hearing the testimony of COWL

Preliminaries

[3] In the instant case, the applicant was not seeking leave in respect of an award or interim award etc, of the Industrial Court. The challenge mounted is in respect of a decision regarding an interlocutory application related to the proceeding. It cannot be said that the decision *per se* will finally dispose of the proceedings. Despite request from the court, the applicant's counsel has failed to produce any authority to show whether it was proper for the High Court at this stage to interfere in interlocutory matters and/or decision which will not have the effect of finally disposing the matter before the Industrial Court. Further, the affidavit in support of the application is filed by the counsel in charge of the matter.

[4] The Law

(a) Generally, a judicial review proceeding is a two stage process preceded first by an application for leave to apply for judicial review. At this stage, though merits of the case will not be considered, it is incumbent upon the applicant to demonstrate that the subject matter of the complaint is amenable to judicial review at the discretion of the court. (See *Jekri Mohd Zinin & 4 Ors v. Director of Lands & Surveys, Sabah & Anor* [2007] 1 LNS 549). *In Tang Kwor Ham & Ors. v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927. Gopal Sri Ram JCA asserted that:

(1) The High Court should not go into the merits of the case at the leave stage. Its role is only to see if the application for leave is frivolous If, for, example, the applicant is a busy body, or the application is made out of time or against a person or body that is immunized from being impleaded in legal proceedings then the High Court would be justified in refusing leave *in limine*. So too will the court be entitled to refuse leave if it is a case where the subject matter of the review is one which by settled law (either written law, or the common law) is non-justiciable, eg, proceedings in Parliament.

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(2) To say that a case is frivolous is the same thing as saying that there is no arguable case. Where the High Court has a doubt about whether the case is frivolous or not, it is for that court to invite the putative respondent to attend and make representations as to whether or not leave should be granted. So, the putative respondent to the substantive motion is not entitled as a matter of right to appear, demand to be heard and to convert the proceedings into a full blown opposed *ex parte* hearing on the merits of the application.

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(3) The *inter partes* leave hearing should not be anywhere near so extensive as a full substantive judicial review hearing. The only circumstance in which a court may, on a leave application, undertake a closer scrutiny of the merits of the case is on an application for extension of time to apply for judicial review.

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(b) The test to be applied at the leave stage in judicial review proceedings was laid down by the Supreme Court in *Association of Bank Officers, Peninsular Malaysia v. Malayan Commercial Banks Association* [1990] 2 CLJ 734 as follows:

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> In his grounds of judgment the learned judicial commissioner had gone further than the leave stage and embarked on substantial issues on merit. We did not think that this was the right approach when the application for leave to apply for an order of *certiorari* is made. The guiding principles ought to be that the applicants must show *prima facie* that the application is not frivolous or vexatious and that there is some substance in the grounds supporting the application. On the evidence in this case, we found that the appellants had *prima facie* an arguable case for the granting of the relief they were seeking. Their application was not frivolous or vexatious. There were grounds to consider the allegations made by the appellants and which could only be properly heard and determined on the substantive application for an order of *certiorari* after leave has been granted.

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(see *Mohamed Nordin bin Johan v. Attorney-General, Malaysia* (FC) [1983] 1 MLJ 68 at 70; *John Peter Berthelsen v. Director-General Of Immigration, Malaysia & Ors* [1986] 2 CLJ 409; [1986] CLJ (Rep) 160 SC; *Tang Kwor Ham & Ors v. Pengurusan Danaharta Nasional Bhd & Ors* [2006] 1 CLJ 927 at 943-946 (CA); and *QSR Brands Bhd v. Suruhanjaya Sekuriti & Anor* [2006] 2 CLJ 532 (CA)).

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(c) In *Clear Water Sanctuary Golf Management Bhd. v. Ketua Pengarah Perhubungan Perusahaan & Anor* [2007] 10 CLJ 111; VT Singham J discussed at length the principles and case law governing an *ex parte* application by the applicant for leave to

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file for judicial review. The learned judge there noted that such leave application was procedural in nature, unlike the substantive relief which is sought if leave is granted, the former being akin to a vetting process, first, to ensure that the applicant has a *locus standi* and is not a mere busybody or "mischief maker" which does not have sufficient interest to challenge the decision or the process of the decision making by way of judicial review and secondly, the applicant has demonstrated a *prima facie* case for leave to be granted. As such, it is settled law that the sole question at the leave stage is whether the application is frivolous. In determining whether the application is frivolous, the learned judge stated the following:

> Frivolous or vexatious action or statement is generally referred to as groundless action or statement with no prospect of success or wanting in *bona fide* or when it is not calculated to lead to any practical result. It is often raised to embarrass or annoy the other party to the action.

(d) In (*Ta Wu Realty Sdn. Bhd v. Ketua Pengarah Hasil Dalam Negeri & Anor* [2008] 6 CLJ 235), the Court of Appeal asserted that in an application for leave for judicial review, the supporting affidavit must be sufficiently complete to persuade the judge that the application before him is not frivolous and vexatious and that there is substance in the grounds to support the application.

[5] I have read the *ex parte* application, affidavit in support and the submission of the applicant's counsel in detail. I take the view that the application must be dismissed. My reasons are as follows:

(a) As a general rule in judicial review proceedings, courts are careful to avoid undue interference or usurpation of the role of the decision maker. In this process the following need to be noted, namely: (i) Judicial review is not an appeal; (ii) it is concerned not with the decision but the manner of reaching it; (iii) is concerned with legality not correctness; (iv) is not concerned with merits; (v) the court does not substitute its own judgment etc; (see *Michael Fordham (1997), Judicial Review Handbooks*). Much inroads to the general principle have been advanced and have become applicable in consequence of the decision of the apex court in *R. Rama Chandran v. The Industrial Court of Malaysia & Anor* [1997] 1 CLJ 147, by widely expending the remedies. I have dealt with this area of law in greater detail and the inroads under the caption of *'Rama's*

A *Remedies'* in the case of *Chong Chung Moi v. State Government of Sabah & 2 Ors* [2007] 4 AMR 472; [2007] 5 MLJ 441. I do not wish to repeat the same here.

(b) *'Rama's Remedies'* goes beyond the scope of *Anisminic* error, Wednesbury unreasonableness, etc. However, for the applicant B to succeed at *ex parte* stage, he must demonstrate how the principle stated in *Rama*'s case will apply to the facts of this case.

(c) In the instant case, the applicant's complaint in essence is in C respect of the correctness of the decision or ruling of the learned chairman, of the Industrial Court, relating to an interlocutory application which is procedural in nature. The Industrial Court is given wide powers under s. 29 of the Industrial Relations Act 1967 to make such interlocutory orders as are necessary or expedient for the expeditious determination D of the matter before it. Industrial jurisprudence does not allow courts to ordinarily interfere with interlocutory matters more so when it is procedural in nature. (See *Kathiravelu Ganesan & Anor v. Kojasa Holdings Bhd* [1997] 3 CLJ 777).

E (d) Further, I note in this case the affidavit in support of the application has been affirmed by the solicitor in charge. Courts have often said that solicitors ought not to affirm affidavits on behalf of their client unless it is of formal nature. For example, affidavit of service etc; (see *Malayan Banking Bhd. v.* F *Charterefield Corporation Sdn. Bhd* [2001] 6 CLJ 407). When seeking prerogative remedies, it is mandatory for the applicant to affirm the affidavit and seek the remedy, (see *Ta Wu Realty Sdn. Bhd (supra)*). Of course, there are some exceptions where the applicant himself cannot be present, such as in *habeas corpus* G proceedings. In the event where the exception does not apply and the solicitors have filed the supporting affidavit and the application is dismissed, the solicitors may be personally liable to costs. However, in this case there was a subsequent affidavit filed by the applicant to regularise proceeding. In consequence, H I had condoned the irregularity and considered the application on merits.

[6] For reasons stated above, it is my judgment that the said application is frivolous, vexatious and abuse of process of court and the application must be dismissed *in limine*.

I **[7]** I hereby order so.